(12)

No. 91-122

In the Supreme Court of the United States

OCTOBER TERM, 1991

PFZ PROPERTIES, INC.,
PETITIONER,
v.
RENE ALBERTO RODRIGUEZ, ET AL.,
RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR RESPONDENTS

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February 3, 1992

PETITION FOR CERTIORARI FILED JULY 22, 1991
CERTIORARI GRANTED NOVEMBER 12, 1991

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QUESTION PRESENTED

Whether an arbitrary, capricious or illegal denial of a construction permit to a developer by officials acting under color of state law can state a substantive due process claim under 42 U.S.C. § 1983.

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CONSTITUTIONAL AND STATUTORY PROVISIONS

The Constitutional provision involved is the Fourteenth Amendment. The relevant portions of the Fourteenth Amendment (Sections 1 and 5) provide:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

> Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

The statutory provision involved is The Civil Rights Act of 1871, ch. 22 § 1, 17 Stat. 13 (1871) (codified as amended at 42 U.S.C. § 1983) (1982). The Act provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT

I. Facts On Record Relevant To The Question Presented

This case concerns a dispute over the development of a tourist hotel and residential complex ("the project") on a portion of a tract of land which Petitioner PFZ Properties, Inc. owns in the area of Vacia Talega-Pinones, east of San Juan. Petitioner PFZ Properties, Inc. is a corporation chartered under the laws of the Commonwealth of Puerto Rico, doing business in Puerto Rico for over three decades as a developer. Respondents are The Puerto Rico

Regulations and Permits Administration ("ARPE"), Rene Alberto Rodriguez ("Rodriguez") and Salvador Arana.[1]

In 1969, The Puerto Rico Planning Board denied PFZ's first proposal to develop a tourist hotel and residential units on its tract of land in Vacia Talega-Pinones. The Planning Board is the agency authorized by law to issue site permits allowing specific uses for undeveloped land in Puerto Rico. Unlike most other agencies, the Planning Board does not operate independently from the chief executive officer of Puerto Rico: the statute creating the Board makes it an "arm" of the Governor and attaches it to The Office of the Governor. The Governor appoints its members and also designates its Chairman.[2]

Among several factors which in 1969 led the Board to deny PFZ's first development proposal were the facts that the vast majority of PFZ's estate was "covered by groves, lagoons and canals which must be preserved for the purpose of protecting the ecology of the area and the production of nourishment for marine life", the estate was in an

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[1] ARPE is an "arm of the state" protected by the Eleventh Amendment against suits for damages. It is a party to this lawsuit only as pertains to petitioner's claim for declaratory and permanent injunctive relief. Rodriguez was Acting Administrator of ARPE from March 1, 1987 until his appointment as Administrator on September 2, 1987. He was replaced by Arana in February 1989. Rodriguez is the sole defendant in an individual capacity. Arana automatically substituted for Rodriguez as an official capacity defendant by virtue of Fed. R. Civ. P. Rule 25(d).

[2] P.R. Laws Ann. tit. 23 § 62a, 62d, 62f. The Board was created for the general purpose of guiding the orderly development of Puerto Rico and to set policies in areas considered to have an impact on the general well-being of present and future inhabitants of Puerto Rico.

isolated area "not ready for urban development due to lack of the [infrastructure] necessary for the feasibility of its development . . .", the vast majority of the estate was in the floodplain and "subject to inundation due to the overflow [of a nearby major river] . . .", and PFZ had not presented to the Board a plan to finance the flood control works that needed to be undertaken if PFZ wished to develop its project in lands subject to inundation.[3]

In April 1970, PFZ requested that the Board reconsider its decision denying the proposal. This time around PFZ submitted to the Board a plan whereby it would develop the tract of land nearest to the ocean in two stages (sections). Under the terms of this plan, PFZ would share in the cost of building the flood control works in the proportion fixed by the Board. PFZ made a commitment to build a road to provide access to the project, as PFZ's tract of land laid in an isolated spot not served by any road in Puerto Rico.

PFZ represented to the Board that it was a bona fide developer and would be able to secure financing to build the access road and all the infrastructure works for its project. Such works, commonly known as "urbanization works", include both on-site and off-site improvements to the site. These are the works that provide a project with roads, sanitary sewer system, drinking water supply, storm sewers, electric power, and so forth.

The Board agreed to reconsider its prior denial of the proposal after PFZ assured the Board that financing for the project was in place. The Board agreed to approve the proposal subject to the condition that PFZ submit an Environmental Impact Statement ("DIA" is its Spanish acronym) to be reviewed by the Puerto Rico Environmental Quality Board (translation into English rendered "Environment Control Board" in documents in the record of this case).

[3] Joint Appendix ("J.A."), 14-15.

In June 1973, PFZ submitted to the Planning Board an alternate preliminary development proposal along with a DIA. The Environmental Quality Board was not satisfied that this DIA adequately documented the adverse impact on the ecologically sensitive area of the road which PFZ was to build. After considerable debate, the Environmental Quality Board determined that PFZ would have to submit another DIA, to be prepared by the Puerto Rico Highways Authority (translation into English rendered "Puerto Rican Road Authority" in documents in the record of this case).

On July 24, 1974, the Planning Board approved PFZ's alternate proposal to develop the project in two stages. The Board's approval resolution expressly noted the several conditions under which approval was being granted, among them, that PFZ comply with the Environmental Quality Board's requirement that the Puerto Rico Highways Authority prepare for its review another DIA, providing complete data on the type of access road that PFZ intended to build and specifying its route and other construction details.[4]

Soon thereafter, several families who resided in the area and claimed property rights over portions of land of PFZ's estate petitioned the Planning Board to reconsider its approval of PFZ's alternate development proposal. The Board denied the petition through a resolution issued May 14, 1976 (J.A., 13-35). The residents sought judicial review of the Board's denial of their petition for reconsideration and the Superior Court of Puerto Rico upheld the Board.

[4] J.A., 19.

The Planning Board's May 14, 1976 resolution denying the residents' petition for reconsideration affirmed its approval of PFZ's alternate proposal to develop the first section of the project, subject to the same conditions placed on PFZ when the Board first approved the alternate proposal on July 24, 1974; chiefly among them, that PFZ build at his own cost all the infrastructure works and that it secure approval from the Environmental Quality Board for the subdivision works or any other construction works.[5]

The Planning Board's May 14, 1976 resolution noted that PFZ's alternate proposal was found to be "not totally in accord with the Plan for Use of Land and Transportation in force for the Metropolitan San Juan area . . .".[6] As regards PFZ's proposal to develop the *second* section of the project, *which comprised the larger portion of the tract which PFZ wished to develop* (266 acres), the Board's May 14, 1976 resolution explicitly conditioned further consideration of this larger section of the project to PFZ's showing of "substantial progress on the construction works [of the first section] and to evidence that the remaining part of the first section will be finished."[7]

The Planning Board's May 14, 1976 resolution authorized PFZ to prepare "the construction blueprints for the subdivision works of the first section."[8] The agreement reached by PFZ and the Board and embodied in this resolution explicitly served notice on PFZ that "the construction blueprints for the subdivision works of the first section" would have to be prepared within one year from the date of issuance of the resolution.[9]

[5] J.A., 30.
[6] J.A., 20-21.
[7] J.A., 30.
[8] J.A., 33.
[9] *Id.*

This resolution reiterated that PFZ had to obtain approval (endorsement) of the Environmental Quality Board for its subdivision works.[10] The Environmental Quality Board had agreed to endorse development of the first stage of the project, *subject to the condition that another DIA be submitted for its review* that adequately documented the impact on the ecologically sensitive area of the road that PFZ would build to provide access to its project.[11]

PFZ in 1978 timely submitted for ARPE review the construction drawings for the subdivision works, which PFZ captioned "Internal Preliminary Development of Blocks For The First Section." ("Internal Preliminary Development"). Review of these subdivision works by ARPE took almost three years. William Salva was ARPE Administrator at the time and during his tenure ARPE on February 24, 1981 issued a resolution approving PFZ's "Internal Preliminary Development".

Respondents took the oral deposition of Engineer Luis Rodriguez who is a partner in "Basora and Rodriguez", the engineering firm retained by PFZ to develop the project. In Engineer Rodriguez's view ARPE took too long in approving the subdivision works because ". . . ARPE became involved in conceptual elements which to the best of our understanding the Planning Board had already resolved. . . ."[12] When asked if a plan for the subdivision works had been submitted for approval to the Environmental Quality Board, which was one of the conditions imposed by the Planning Board's May 14, 1976 resolution approving development of the first section of the

[10] J.A., 30.
[11] J.A., 19.
[12] J.A., 401.

project, Engineer Rodriguez answered: "No, it was not submitted."[13]

Pursuant to the ARPE February 24, 1981 resolution approving PFZ's "Internal Preliminary Development", PFZ was authorized to submit for ARPE's review construction drawings for the urbanization works [on-site and off-site] to serve the first section of the project.[14] These drawings for the urbanization works, which ARPE engineers (technicians) would be reviewing at the time, would be drawings that had been prepared following the specifications and recommendations of the relevant public bodies and approved (endorsed) by these bodies *before* their submission to ARPE for ARPE's certification of the urbanization works, after which ARPE would issue the construction permit.

Only after these drawings had obtained the approval or endorsements of the relevant public bodies would they become final drawings. ARPE's "Manual of Procedures for Processing Construction Plans and Inscription Plans for Urbanizations" provides that "[b]efore submitting the construction plans in *final* form to the consideration of the Board and/or the Regional Planning Office, the developer or planner must submit to the other governmental agencies concerned the *final* sets of plans which may be required to obtain their *final* endorsement." (J.A., 5-6) (emphasis supplied).[15] The ARPE February 1981

[13] J.A., 457.

[14] The ARPE February 24, 1981 resolution was omitted from the Joint Appendix. Respondents have reproduced it as an Appendix to this Brief.

[15] The Manual of Procedures was approved by the Planning Board to rule the procedures at ARPE after ARPE's creation in 1975. References to the "Board" and to "Regional Planning Office" nevertheless remained in the Manual.

resolution also called on PFZ to submit its construction drawings in *final* form (App. to this Brief, A4-A5).

The Manual of Procedures also called on PFZ to submit "[e]vidence of compliance with the Environmental Public Policy Act", if PFZ wished to obtain from ARPE preliminary authorization to proceed with the earth movement works prior to obtaining approvai of the final construction plans (J.A., 3-4). "Evidence of compliance with the Environmental Public Policy Act" would entail that PFZ obtain approval for the earth moving works from the Environmental Quality Board.

The ARPE February 24, 1981 resolution allowed PFZ one year from the date of issuance of the resolution to submit the final construction drawings for urbanization works, and explicitly served notice on PFZ that if the drawings were not submitted by the deadline, ARPE's approval of PFZ's "Internal Preliminary Development" would cease to be in force and [the case] "considered abandoned and . . . sent to the files [dismissed] for all legal effects."[16] Section IV of the First Part of ARPE's Manual of Procedures authorizes ARPE to dismiss a case [project] for, among other reasons, "because the effective term for the preliminary development has expired" (J.A., 9).

On February 22, 1982, that is, within the deadline set forth in the ARPE resolution, PFZ's engineers wrote a letter to then ARPE Administrator Edmundo Colon (J.A., 36-38). In this letter, Engineer Luis Rodriguez advised ARPE that it was submitting "Construction Plans for Block No. 2" along with "preliminary designs" for the structures to be erected on Block No. 2. The "preliminary

[16] App. to this Brief, A-16.

designs" for structures were returned by ARPE in March 1982 because the ARPE 1981 resolution required PFZ to first obtain certification of its drawings for urbanization works.

Engineer Rodriguez's letter explicitly acknowledged that these construction drawings for Block No. 2 *were not final construction drawings.* His letter informed ARPE that the final construction drawings "... are now being prepared, and at the appropriate time we will submit them for the consideration and endorsement [approval] of the agencies mentioned [in the letter] (J.A., 38). This letter also informed ARPE that Engineer Rodriguez had yet to prepare the drawings for the off-site works required to serve the project and, thus, that these other drawings were not being submitted (J.A., 37).

A key document in the record of this case is a letter prepared and ready to be signed by former ARPE Administrator Lionel Motta ("Motta"), to be sent to PFZ's engineers on February 26 1987. Motta was respondent Rodriguez's predecessor as Administrator of ARPE. In his letter to PFZ's engineers Motta informed them that the construction drawings which had been submitted to ARPE in February 1982 lacked the "basic details about the urbanization works to serve the project" (J.A., 62). Along with this letter Motta was returning the construction drawings that had been submitted in February 1982.

Motta's letter granted PFZ's engineers one year from the date of the letter to submit the *final* construction plans for the urbanization works "as provided by Planning Board Regulation No. 12."[17] The letter admonished that if the final drawings were not submitted within the deadline, "it shall be taken to mean that [the developer] has desisted from the project and this [project] shall be dismissed for all legal purposes and effects" *(Id.)*.

PFZ never submitted final construction drawings for urbanization works to ARPE. As a matter of fact, these drawings were never prepared and submitted to the public bodies for their approval. From 1982 to 1986 ARPE received no inquiries from PFZ in connection with its project. The parties agreed in the Pretrial Order on the contents of documents that ARPE kept in a special, not "secret", project file (Pretrial Memorandum, 56-57).

Among these documents there are several letters from a number of public bodies answering the letters of PFZ's engineers, some dating from 1978, inquiring about facilities planned or programmed to serve the project in the near future. One of these letters informed PFZ's engineers that PFZ would have to advance to the power authority more than 50% of the cost of building power facilities for the project.

PFZ secured approval from the Planning Board for its development proposal *subject to the condition that it build all the infrastructure works.* The Planning Board's May 14, 1976 resolution explicitly noted that since PFZ proposed to develop its project in an isolated area where no infrastructure was in place, PFZ would have to build these facilities at its own cost (J.A., 25).

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[17] Regulation No. 12 became in force in May 1984. This regulation changed the practice at ARPE in connection with the technical review for the certification of urbanization works. Under Regulation No. 12 PFZ's engineers would themselves certify the plans and file them with ARPE. After this Regulation became in force in 1984 ARPE stopped the practice of performing a technical review of drawings to certify them.

The years went by and PFZ never made final arrangements with the Puerto Rico Highways Authority in connection with the access road it was to build. Nor were *final* plans submitted to the electric power authority or to any public body for approval of the project. In sum, PFZ never began any work on the project and did not contact ARPE until its engineers wrote Motta in January 1986 inquiring about the "technical review" of its drawings.[18]

Motta learned from Cruz Marcano ("Marcano"), Assistant Administrator for Regional Operations at ARPE, that PFZ had filed some "incomplete plans" (J.A., 157). According to Motta, it would be easier to deal with the technical aspects of the drawings; "the difficult part was with the planning field, and we . . . certainly didn't want to do something which might have been incorrect" (J.A., 163). Motta, of course, knew too well that by the time ARPE received PFZ's January 1986 letter PFZ's project could not be processed under "Regulation No. 12". The project would have to undergo extensive review before ARPE could issue a permit.

PFZ was aware of this fact, as ARPE informed PFZ's engineers that upon receipt of PFZ's January 1986 letter Motta had held a meeting with the public bodies to discuss the project. (J.A., 57).

PFZ, moreover, consented to have its project reviewed after September 1986. Its President and engineers at-

[18] As earlier noted, ARPE stopped the practice of technical review and certification of drawings after Regulation No. 12 became in force in May 1984. ARPE sent a letter to PFZ's engineers notifying them of these changes in regulations (J.A., 43-44). PFZ's engineers never answered this letter (J.A., 459-460).

tended a meeting with the heads of the agencies that were reviewing the project.

At this meeting, PFZ's spokesman told his audience that *the project was not feasible unless PFZ obtained approval for the second section of the project.* The head of the Environmental Quality Board told Motta that a new DIA would have to be prepared and reviewed. The head of the Department of Natural Resources held the view that since the Department had designated the area as a natural preserve of mangroves, a decision on whether to approve the *second* section of the project would have to await further review. PFZ's *second* section of the project would lay on land that was 60% mangrove forest.

The head of the Planning Board was of the view that the Board had fully reviewed the project's environmental impact at the time it had approved the project in 1974. The head of the Environmental Quality Board insisted, however, that the process of review had never been completed in 1974, and called for a new DIA.

The Planning Board's Organic Act provides that ["t]he public policies and plans that may be formulated by the Environmental Quality Board shall be submitted immediately after their preliminary approval to the Planning Board so as to determine their conformance with the integral-development policies and strategies the Planning Board may have adopted." *See*, P.R. Laws Ann. tit. 23 § 62 X. The statute further provides:

> If no mutual agreement is reached between both agencies as to proposals offered, the policies and plans preliminary [sic] approved by the Environmental Quality Board shall be submitted, with the positions assumed by the latter and by the Planning

> Board, to the Governor. The Governor shall, if he deems it necessary, appoint a committee of three (3) persons to study the positions of both agencies. The Governor shall take proper final action.

Id.

In 1986, a bill had been introduced in the Puerto Rico Senate calling for the preservation of the mangrove forest in Vacia Talega-Pinones and requesting that funds be allocated to condemn PFZ's tract of land. In November 1987 the sponsors of this bill called on the Governor to "freeze" PFZ's project while the House of Representatives considered the bill. The Governor announced that same month that no permit decision would be made until after the Planning Board had reevaluated public policy on land uses in Vacia Talega. The Governor had already appointed a task force under the aegis of the Planning Board, and it was expected that the Board would soon formulate a policy that could accommodate the conflicting interests converging on the Vacia Talega-Pinones area.

In December 1987, the President of PFZ met with the Governor's aide on Tourism to discuss the project. The Governor's aide expressed that in light of more pressing priorities, there were no plans to acquire PFZ's lands in a condemnation proceeding. The Governor's aide told the President of PFZ that environmental regulations and policies were at odds with PFZ's wish to build the *second* section of its project. A few days after this meeting took place PFZ filed a complaint against respondent Rodriguez in the trial court below.

II. Procedural History

PFZ filed the complaint in December 1987 and alleged that Rodriguez had refused to act on PFZ's construction drawings and that his failure to approve the drawings

constituted "an illegal taking of [PFZ's] property without just compensation." (J.A., 92). Rodriguez moved the court to dismiss the complaint on the ground the "taking" claim was not ripe.

While these pleadings were under the court's advisement PFZ moved for an enlargement of time to oppose Rodriguez's motion to dismiss. Meanwhile, the ARPE Assistant Administrator for Regional Operations (Marcano) wrote a letter to PFZ's engineers telling them that PFZ's "Internal Preliminary Development" had ceased to be in force, because under the terms of the ARPE February 1981 resolution the one-year period during which PFZ had to submit final construction drawings for the urbanization works had expired, and PFZ had not submitted the requisite drawings. A similar letter went out to PFZ's engineers from the Assistant Administrator of the Technical Review Division.

After PFZ received these letters it filed an Amended Complaint and named both ARPE and Rodriguez as defendants. The Amended Complaint, which this Court is reviewing today, averred *inter alia* that defendants' "deliberate actions, including the undue delay in processing and illegal refusal to process plaintiff's 'approved' Construction Drawings since February 1983 [were] arbitrary, capricious and unreasonable, depriving plaintiff of its substantive rights to property, including vested rights, without due process of law" (J.A., 137).

Defendants answered the Amended Complaint and filed a motion to dismiss under Fed. R. Civ. P. Rule 12(b)(6). Later on, Rodriguez filed a motion for summary judgment under Fed. R. Civ. P. Rule 56. PFZ timely opposed both motions. After the parties had concluded discovery, the court approved a Pretrial Order and set the trial to commence on January 22, 1990.

On January 12, 1990, the court vacated the Pretrial Order and granted defendants' motion under Rule 12(b)(6).[19] PFZ took a timely appeal and the court below affirmed the dismissal of the Amended Complaint (J.A., 502-511). PFZ filed a Petition for Rehearing which the court below denied, after which it petitioned this Court for a writ of certiorari. The Court granted the petition on November 12, 1991 to review the following question:

> "Whether an arbitrary and capricious or illegal denial of a construction permit to a developer by officials acting under color of state law can state a substantive due process claim under 42 U.S.C. § 1983".

SUMMARY OF ARGUMENT

Respondents' denial of a construction permit to petitioner has not deprived it of a constitutional property or "liberty" interest. Respondents have not placed any unconstitutional restrictions on petitioner's asserted right "to devote its land to any legitimate use." Petitioner is not now asserting a "taking" claim; petitioner's claim is that respondents refused to process its project and issue a construction permit. The Planning Board and ARPE resolutions did not create a protected property interest in favor of petitioner. The Administrator of ARPE exercised his discretion and professional judgment when he refused to issue the permit, on the ground that petitioner had failed to comply with the conditions under which it had obtained initial approval for its project.

The Due Process Clause protects state-created property interests that rise to the level of a legitimate

[19] J.A., 479-493.

entitlement; it does not protect unilateral expectations or abstract needs. It also protects fundamental rights or liberties. PFZ did not acquire an entitlement to the permit because it failed to comply with the several conditions that formed part of the agreements embodied both in the Planning Board and ARPE resolutions.

Assuming, *arguendo*, that petitioner had acquired a legitimate entitlement to the permit, this entitlement was lost when the Governor of Puerto Rico announced that a decision to issue the construction permit would have to await the outcome of a reevaluation of public policy on land uses in Vacia Talega. Petitioner at the time might have had other remedies available to secure its property rights in his real estate in Vacia Talega. Petitioner, however, did not have, and could not claim to have, an entitlement to the construction permit. Petitioner may not use a substantive due process theory as a device to "ripen" what appears to be an unripe "taking" claim and litigate it under the guise of official misconduct.

In dismissing petitioner's project and denying a construction permit respondents did not deprive petitioner of a "liberty" interest protected by the Due Process Clause. Petitioner concedes that the asserted right "to devote its land to any legitimate use" is not a "fundamental right." Petitioner has not shown that this asserted right comes within the scope of the sort of individual liberties that this Court has been willing to recognize in the past.

The Amended Complaint which the Court is reviewing today *was never amended to plead that Rodriguez performed a deliberate "sham" or "pretextual" review of petitioner's construction drawings.* Petitioner has stated in its brief to this Court that Rodriguez engaged in "arbitrary and capricious or illegal" conduct because he delib-

erately reviewed the wrong drawings. (Pet. Brief, 9). Whereas the Court has a duty to liberally construe the averments in petitioner's Amended Complaint, the Court most certainly is under no duty to rewrite the Amended Complaint to contain allegations of official misconduct that petitioner did *not* include in the Amended Complaint.

An expansive reading of the Due Process Clause such as urged by petitioner will radically alter the doctrines of federalism and comity in an area that is the quintessential province of state and local authorities. It will promote forum shopping and increase federal court intervention to litigate what are, essentially, claims of alleged violations of state and local development codes. The rule urged by petitioner does not strike the proper balance among the concerns of developers, local authorities and federal courts.

ARGUMENT

THE ARBITRARY AND CAPRICIOUS DENIAL OF A CONSTRUCTION PERMIT TO PETITIONER DOES NOT TRIGGER SUBSTANTIVE DUE PROCESS PROTECTION

I. Petitioner Has Not Been Deprived Of A Constitutionally Protected Property Interest: The Planning Board And ARPE Resolutions Are Not A Source Of That Interest

The Due Process Clause protects state-created property interests. The Constitution itself is not the source of property rights or interests; they are "created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law. . . ." *Cleveland Bd. of Education* v. *Loudermill*, 478 U.S. 532, 538 (1985); *Bishop* v. *Wood*, 426 U.S. 341, 344 (1976); *Board of Regents* v. *Roth*, 408 U.S. 564, 577 (1972). The hallmark of property is an individual entitlement grounded in state law, which cannot be removed except "for cause." *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 430 (1982); *Memphis Light, Gas & Water Div.* v. *Craft*, 436 U.S. 1, 11-12 (1978); *Goss* v. *Lopez*, 419 U.S. 565, 573-574 (1975).

Since the Court's decision in *Roth*, *ante*, property interests that receive constitutional protection are those that rise to the level of "a legitimate claim of entitlement." 408 U.S. at 577. *Roth's* companion case, *Perry* v. *Sindermann*, 408 U.S. 593 (1972), emphasized that "property" in the constitutional sense embraces the broad range of interests secured by "existing rules or understandings." *Id.* at 601. A person's interest in a benefit may qualify "if there are such rules or mutually explicit understandings that support his claim of entitlement to the benefit." *Id.*

In *Bishop* v. *Wood*, *ante*, the Court made clear that state law determines the existence of an entitlement: "[w]hether such a guarantee has been given can be determined only by an examination of the particular statute or ordinance in question." 426 U.S. at 344-45 (footnote omitted). The Court in *Bishop* was examining an ordinance on which the petitioner in that case relied as conferring an entitlement to continued employment. The ordinance merely conditioned an employee's removal on compliance with certain specified procedures. *Id.* at 345. The ordinance did not itself contain any language from which to conclude that petitioner in that case had a legitimate claim or entitlement to continued employment.

PFZ's property interest in obtaining a construction permit (more specifically, its interest in having respondents review its construction drawings and process the project)

is premised on the averment in paragraph No. 37 in the Amended Complaint that respondents had "approved [its] Construction Drawings since February 1983" (J.A., 137). However, ARPE's February 1981 resolution approving petitioner's "Internal Preliminary Development" does not give rise to a property right in the construction permit. The ARPE resolution, just like the Planning Board's 1976 resolution, granted preliminary approval that would be in force for one year. These approvals imposed on petitioner a number of conditions that had to be met within one year of the date of issuance of these resolutions. The initial approvals of petitioner's project entailed no assurance of final approval of the project.

The ARPE February 1981 resolution required that PFZ submit *within one year* the final construction drawings for urbanization works approved by several public bodies. PFZ never complied with this requirement and, therefore, its initially approved "Internal Preliminary Development" expired on the deadline set forth in the ARPE FEbruary 1981 resolution. Just as *Roth* held that a non-tenured teacher with a one-year contract of employment had no property interest in continued employment beyond the one year, the initial and conditional approvals secured by PFZ from the Planning Board and from ARPE are not a source of a property interest in the construction permit. Initial approval for petitioner's project did not guarantee final certification of the construction works with a view to issuing the permit.

The Administrator of ARPE has wide discretion in reviewing construction projects. He is empowered to grant dispensations and allow modifications when enforcing the Planning Regulations which ARPE enforces. *See*, P.R. Laws Ann. tit. 23 § 71i, which provides that:

> The Administrator may dispense with compliance with the requirements of the Planning Regulations pursuant to the provisions thereof, in cases where the literal application of its provisions may result in the unreasonable prohibition or restriction of the enjoyment of a holding or property and it is shown to his satisfaction that said disposition will mitigate a prejudice clearly provable, and he may impose such conditions as the case may warrant for the benefit of the public interest.

See also, *Regulations and Permits Administration* v. *Ozores-Perez*, 116 D.P.R. 816, 16 Official Translations of the Opinions of the Supreme Court of Puerto Rico 1009, 1011 (1986), where the Supreme Court stated that the legislative intent of ARPE's Organic Act was to grant it "broad policy-making discretion . . . in the formulation and maintenance of permit-processing proceedings", and *The Richards Group of Puerto Rico, Inc.* v. *Puerto Rico Planning Board*, 108 D.P.R. 23, 8 Official Translations 20, 25-26 (1970), stating that the purpose of ARPE's Organic Act was to transfer the operational and enforcement duties of the Planning Board to ARPE to allow it to consider individual cases and permits, freeing the Board from these functions.

Although the Administrator of ARPE can grant dispensations from the Planning Board's Regulations, the Administrator of ARPE has no statutory authority to approve a project which has not been endorsed by one or more of the public bodies whose approval is needed under the applicable state laws. The Administrator does not formulate public policy on land uses; that function belongs to the Planning Board.

Construction in Puerto Rico is a highly regulated activity. Approvals by the Board and ARPE are expressly limited to one-year periods, so as to ensure that the agencies' extensive and time-consuming process of review of development proposals is not wasted on developers' often grandiose plans for which they have no financing in place. The agencies must have a degree of certainty that they are dealing with bona fide developers.

An expansive reading of the Due Process Clause such as urged by petitioner is bound to radically alter the character of "Our Federalism". The rule proposed by petitioner does not strike the proper balance between the federal courts' duty to afford relief to developers whose federally protected rights have been infringed, and the interests of state and local administrators of developments codes. Land-use regulation has traditionally been recognized as an activity uniquely in the domain of state and local officials. Land-use regulations generally affect a broad spectrum of persons and social interests, and local bodies are better able than federal courts to assess the benefits and burdens of these regulations.

The standard under which the court below reviewed petitioner's substantive due process claim does not leave developers at the mercy of abusive state and local officials. To require developers to show more than artful pleadings well-dressed with constitutional verbiage and adorned with the requisite adjectives "arbitrary", "capricious", "unreasonable" and so forth, will adequately guard against the constitutionalization of state and local land-use regulations. As the First Circuit has held:

> "[e]very appeal by a disappointed developer from an adverse ruling by a local . . . planning board necessarily involves some claim that the board exceeded, abused, or 'distorted' its legal authority in some manner, often for some allegedly perverse (from the developer's point of view) reason. It is not enough simply to give these state law claims constitutional labels such as 'due process' or 'equal protection' in order to raise a substantial federal question under section 1983."

Creative Environments v. *Estabrook*, 680 F.2d 822 (1st Cir.) *cert. denied*, 459 U.S. 989 (1982).

Where a developer is unable to show a protected property interest in a permit, and his claim is that the planning authorities have deviated from state or local regulations, the balance should weigh in favor of the local officials absent an allegation of purposeful or invidious discrimination, or of a violation of a specific constitutional safeguard. The following cases, because of their emphasis on the *stratum* provided by state law best illustrate this principle:

In the context of a denial of a building permit at least one circuit court decision has required that a plaintiff possess a property interest in the permit under state law before substantive due process protection may attach. *See*, *MacKenzie* v. *City of Rockledge*, 920 F.2d 1554, 1559 (11th Cir. 1991) (allegation that plaintiff was arbitrarily denied a building permit in violation of substantive due process rights found without merit, since he did not have a property interest in the permit under state law). Several lower courts have refused to recognize that substantive due process protection attaches when the only rights asserted are state-created. *Charles* v. *Baesler*, 910 F.2d 1349, 1353 (6th Cir. 1990) (state-created contractual rights are not deeply rooted in history or tradition and

their breach is not the sort of injustice inherent in egregious abuse of government power); *Weimer* v. *Amen*, 870 F.2d 1400, 1406 (8th Cir. 1989) (complaint alleging nothing more than violation of state law should be dismissed); *Estate of Himelstein* v. *City of Fort Wayne*, 898 F.2d 573, 577 (7th Cir. 1990) (actions of the zoning board held not irrational nor arbitrary so as to trigger substantive due process protection when government decisions are motivated by local interests, and federal courts should be reluctant to assume the role of a zoning board of appeals); *Shelton* v. *City of College Station*, 780 F.2d 475, 479-83 (5th Cir.) *cert. denied* 477 U.S. 905 (1986) (since zoning decisions are legislative determinations which should be given the same deference as statutes enacted by state legislatures, federal judicial interference under substantive due process is proper only if governmental body could had no legitimate reason for its decision).

Other lower courts have erected a barrier to substantive due process claims if state remedies are adequate. *Polenz* v. *Parratt*, 883 F.2d 551, 558-59 (7th Cir. 1989); *Albery* v. *Redding*, 718 F.2d 245, 251 (7th Cir. 1983); *Brown* v. *Brienen*, 722 F.2d 360, 366-67 (7th Cir. 1983) (substantive due process does not provide protection for state-created property interests); *Buhr* v. *Buffalo Pub. School Dist.*, 500 F.2d 1196, 1202 (8th Cir. 1974) (plaintiff must at least have a property or liberty interest sufficient to trigger procedural due process before substantive due process will apply); *Pedersen* v. *Ramsey County*, 697 F.Supp. 1071, 1081 (D. Minn. 1988) (since right is a creature of state law, even an arbitrary deprivation of this property right should not be found to violate the due process clause); *Nollan* v. *Douglas County*, 903 F.2d 1546, 1553-54 (11th Cir. 1990) (although a substantive due process violation occurs where an employer deprives

an employee of his job for an improper motive by pretextual, arbitrary and capricious means, plaintiff must initially prove that he possessed a property interest in continued employment); *Gutzwiller* v. *Fenik*, 860 F.2d 1317, 1328 (6th Cir. 1988) (a federally recognized interest in liberty or property must be impaired for substantive due process to be violated); *Neuwirth* v. *Louisiana State Bd. of Dentistry*, 845 F.2d 533, 558 (5th Cir. 1988) (plaintiff had to first establish a constitutionally protected interest derived from state law as a prerequisite to asserting a substantive due process violation).

These decisions are sound; as they accord due regard to state and local authorities in the administration of state law and avoid needless federal-state friction in matters that are the quintessential province of state and local authorities. "Our Federalism", that is, the nature of our constitutional system, emerged from the Constitutional Convention as the product of compromise. Federalism, as understood by the Framers of the Constitution, should not suffer further erosion on account of a judicial interpretation of the Due Process Clause that would nationalize the law of urban planning and development.

II. Petitioner Has Not Been Deprived Of A Constitutional Liberty Interest Nor Of Any Substantive Constitutional Right

PFZ seeks to have the Court discover its asserted right "to devote its land to any legitimate use" imbedded in the Due Process Clause. It nevertheless concedes that this right is not a fundamental right (Pet. Brief, 14). PFZ moreover fails to demonstrate the constitutional dimension of that right.

The Due Process Clause has been held to include a substantive component barring certain arbitrary or wrongful governmental actions "regardless of the fairness of the procedures used to implement them." *Zinermon* v. *Burch*, 494 U.S. 113, 125 (1990) (quoting *Daniels* v. *Williams*, 474 U.S. 327, 331 (1986). In *Rochin* v. *California*, 342 U.S. 165, 172 (1952) the law enforcement officers' attempt to obtain evidence from a criminal defendant by pumping for stomach contents was held to be prohibited misconduct that "shocks the conscience."

Beyond protection against restrictions on the body of a person, this Court has recognized that "liberty" may in some circumstances extend beyond protections of the physical person. However, the Court has stated that "[w]ithout that core textual meaning as a limitation, defining the scope of the Due Process Clause 'has at times been a treacherous field for this Court.' " *Michael H.* v. *Gerald D.*, 491 U.S. 110 (1989) (plurality opinion) (quoting *Moore* v. *City of East Cleveland*, 431 U.S. 494, 502 (1977).

In *Michael H.* v. *Gerald D.*, a plurality of the Court expressed that "[i]n an attempt to limit and guide interpretation of the [Due Process] Clause, we have insisted . . . that the interest denominated as a 'liberty' interest be 'fundamental'[.]". 491 U.S. 110, 122. Along with the plurality, Justice Scalia, in a footnote joined by Chief Justice Rehnquist, emphasized the examination of historical traditions as a means of determining what asserted rights are "fundamental", 109 S.Ct. at 2342 n. 6. *See also Cruzan* v. *Director, Missouri Dept. of Health*, 110 S.Ct. 2859, 2860 (1990) (Scalia, J., concurring) ("It is at least true that no 'substantive due process' claim can be maintained unless the claimant demonstrates the State has

deprived him of a right historically and traditionally protected against State interference.").

The Court has been cautious when construing the term "liberty", rejecting asserted liberty interests that may arguably be of great personal significance but that transcend purely personal liberty to impact substantially on others. The Court's narrow construction of "liberty" evinces the concern that judge-made law should not circumvent Article V of the Constitution and provide judges with a device to rewrite the Constitution.

Petitioner's asserted right "to devote its land to any legitimate use" is far from "fundamental". Petitioner concedes as much (Pet. Brief at 15). To the extent that petitioner and its *amici* imply that the asserted right is one "deeply rooted in this Nation's history and tradition", *Moore* v. *City of East Cleveland*, 431 U.S. at 503 (plurality opinion), petitioner overstates its case and overlooks that since the beginning of this century, planning and zoning have been valid tools to promote a concept of ordered living.[20]

Land-use regulations generally have been upheld as a valid exercise of the police power. This Court has upheld zoning ordinances that restrict an individual's use of his property, in the interest of public health, safety, morals or general welfare. *Village of Belle Terre* v. *Boraas*, 416 U.S. 1 (1974); *Village of Euclid* v. *Ambler Realty Co.*, 272 U.S. 365 (1926); *Young* v. *American Mini Theatres, Inc.*, 427 U.S. 50 (1976).

More on point, petitioner has not shown that the right to obtain a construction permit is one "deeply rooted in

[20] *See, generally*, C. Haar & M. Wolf, Land-Use Planning, (Little, Brown & Co.) (1989).

this Nation's history and tradition", *Moore* v. *City of East Cleveland*, *ante*, at 503 (plurality opinion), nor that its interest in securing the permit without undue delay is "implicit in the concept of ordered liberty" such that "neither liberty nor justice would exist if [this interest] were sacrificed." *Palko* v. *Connecticut*, 302 U.S. 319, 325-26 (1937). Petitioner's asserted right "to devote its land to any legitimate use", or its interest in obtaining a construction permit without delay "bears little resemblance to the fundamental interests that previously have been viewed as implicity protected by the Constitution." *Regents of the University of Michigan* v. *Ewing*, 474 U.S. 214, 229-230 (1985). (Powell, J., concurring).

The Amended Complaint avers a constitutionally protected property interest in connection with respondents' review of PFZ's construction drawings and the processing of its project by ARPE. In its brief to this Court, petitioner has asserted a constitutional right "to devote its land to any legitimate use." Petitioner, however, does not characterize this right as either property or "liberty". It cites to the Court's cases on zoning restrictions on the use of land, and proposes a test to review alleged official misconduct that is incongruous in the context of a Sec. 1983 claim to redress deprivations of federally protected rights (Pet. Brief, 20). The test is simply unworkable, because defendants in Sec. 1983 actions are not generally entitled to deference, nor are their actions presumptively valid.

The majority of this Court's substantive due process decisions have identified certain "fundamental rights" with an explicit or implicit source in various provisions of the Constitution. In *Bowers* v. *Hardwick*, 478 U.S. 186, 191-192 (1986), the Court refused to recognize the existence of a constitutional right of privacy to engage in

homosexual conduct. In *Cruzan* v. *Director, Missouri Dept. of Health*, 110 S.Ct. 2841 (1990) the Court assumed the existence of a constitutional right of competent individuals to refuse life-sustaining medical treatment. *Washington* v. *Harper*, 494 U.S. 210 (1990) recognized an inmate's liberty interest in avoiding unwanted administration of antipsychotic drugs, and balanced it against the legitimate interests of state authorities. *Youngberg* v. *Romeo*, 457 U.S. 307 (1982) recognized the interest in personal security and freedom from unnecessary bodily restraint of persons committed to mental institutions. *See also*, *Griswold* v. *Connecticut*, 381 U.S. 479 (1965) (right to marital privacy); *Roe* v. *Wade, 410 U.S. 113 (1973) (right to terminate pregnancy); Eisenstadt* v. *Baird*, 405 U.S. 438 (1972) (right to use contraceptives); *Moore* v. *City of East Cleveland*, 431 U.S. 494 (1977) (freedom from zoning ordinance restricting family integrity); *Pierce* v. *Society of Sisters*, 268 U.S. 510 (1925) (right to education of children in private schools); *Meyer* v. *Nebraska*, 262 U.S. 390 (1923) (right to German language instruction).

In *Regents of the University of Michigan* v. *Ewing*, *ante*, the Court found it necessary to "assume the existence of a constitutionally protectible right" in continued enrollment in a medical program, and to further assume that this property interest gave rise to a substantive right under the Due Process Clause to be free from arbitrary state action, before considering whether the state had in fact acted arbitrarily. 474 U.S. at 223. Thus, even where the Court has not expressly articulated a "fundamental right", a plaintiff nevertheless must show a deprivation of constitutional magnitude.

PFZ has not made this showing. Its asserted right "to devote its land to any legitimate use" has not been articu-

lated with reliance to traditional concepts of property or of liberty. Petitioner suggests that an independent constitutional interest lurking somewhere should be recognized in its own right. In light of its reliance on the Due Process Clause itself, PFZ is asserting only a generalized right to be free from arbitrary and capricious governmental conduct.[21]

The Due Process Clause does not protect against *all* arbitrary governmental actions, but only against *certain* arbitrary, wrongful actions. *Zinermon*, *ante*, at 983 (quoting *Daniels* v. *Williams*, *ante*, at 331). It "prevents the government from engaging in conduct that 'shocks the conscience', or interferes with rights 'implicit in the concept of ordered liberty'." *United States* v. *Salerno*, 481 U.S. 739, 746 (1987) (quoting *Rochin* v. *California*, *ante*, at 172); *Palko* v. *Connecticut*, *ante*, at 325-26.

The substantive content of the Clause "is suggested neither by its language nor by preconstitutional history; that content is nothing more than the accumulated product of judicial interpretation of the Fifth and Fourteenth Amendments." *Moore* v. *City of East Cleveland*, *ante*, at 543-44 (White, J., dissenting). Because the Due Process Clause's substantive "gloss has . . . not been fixed but is a function of the process of judgment, the judgment is bound to fall differently at different times and differently at the same time through different judges." *Rochin*, *ante*, at 170.

[21] This Court has yet to hold that the Fourteenth Amendment is the source of a generalized right to a "freedom from arbitrary adjudicative procedures." *See*, Van Alstyne, *Cracks in "The New Property": Adjudicative Due Process In The Administrative State*, 62 Cornell L. Rev. 445, 487 (1977).

Given the absence of constitutional language to guide an interpretation of the Due Process Clause, "[s]ubstantive due process has at times been a treacherous field for this Court". *Moore* v. *City of East Cleveland*, *ante*, at 502. There should be great resistance to expand the substantive reach of the Due Process Clauses, particularly if it requires redefining the category of rights deemed to be fundamental. *Bowers*, *ante*, at 194-95.

To be sure, there has been disagreement over whether substantive due process is limited to those interests that are "implicit in the concept of ordered liberty" such that "neither liberty nor justice would exist if they were sacrificed", *Palko* v. *Connecticut*, *ante*, at 325-26, or whether it extends to fundamental liberties not specified in the Constitution but "deeply rooted in this Nation's history and tradition", *Moore* v. *City of East Cleveland*, *ante*, at 503 (plurality opinion). Under either standard, however, a substantive due process claim comes to this Court with a heavy burden of justification to bear. *Bowers*, *ante*, and petitioner has not met this burden.

In an action under Sec. 1983 for redressing the deprivation of federally protected rights, an essential element of the cause of action is that the conduct complained of "deprive" the plaintiff of rights, privileges, or immunities secured by the Constitution or laws of the United States. *See*, *Graham* v. *Connor*, 490 U.S. 386, 394 (1989) (" 'The first inquiry in any § 1983 suit' is 'to isolate the precise constitutional violation with which [the defendant] is charged' "), (quoting *Baker* v. *McCollan*, *ante*, at 140).

A substantive due process claim must require the identification of a constitutional right. Otherwise, every al-

leged arbitrary or capricious governmental conduct would result in a constitutional claim. The Court's concern with trivialization of the Fourteenth Amendment has been articulated and reiterated in several of its decisions. *See, Daniels, ante,* at 332; *Davidson* v. *Cannon,* 474 U.S. 344 (1986); *Hudson* v. *Palmer,* 468 U.S. 517 (1984); *Parratt* v. *Taylor,* 451 U.S. 527 (1981); *Baker* v. *McCollan,* 443 U.S. 137 (1979); *Paul* v. *Davis,* 424 U.S. 693 (1976).[22]

Petitioner has failed to assert anything more than an alleged violation of state regulations governing the review of construction drawings at ARPE. However, ["o]ur Constitution deals with the large concerns of the governors and the governed ... it does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society." *Daniels, ante,* at 332; *see also, Cruzan, ante,* at 2863 (Scalia, J. concurring) ("This Court need not, and has no authority, to inject itself into every field of human activity where irrationality and oppression may theoretically occur[.]").

Thus, whether or not ARPE could be shown to have illegally departed from its procedures cannot be determinative of whether PFZ has a substantive due process claim. Violations of state or local law do not necessarily invade federally protected rights, and a § 1983 plaintiff must point to a specific constitutional guarantee safeguarding the interest he asserts has been invaded. *Paul* v. *Davis, ante,* at 700; *Cf. Fair Assessment in Real Estate Assoc., Inc.* v. *McNary,* 454 U.S. 100 (1981) (claims of discriminatory administration of state tax system do not state cause of action under § 1983).

[23] *See, generally, C.F. Abernathy, Section 1983 and Constitutional Torts,* 77 Geo. L. J. 1441 (1989).

Substantive due process must be limited to instances where a recognized constitutional interest has been infringed. The standard under which the First Circuit reviewed petitioner's substantive due process claim does not leave developers at the mercy of abusive planning authorities, and properly recognizes the role of federal courts in sec. 1983 actions in the land-use context. The standard is one that adequately affords relief to developers deprived of their federally protected rights. Under the First Circuit standard, the analysis of substantive due process claims in the land-use context shows proper regard for the interests of state and local authorities in the administration of their development codes.

Not just the First Circuit, but other circuit courts show identical concern with federalism or comity. Petitioner's *amicus* National Association of Home Builders notes that other circuits are following the First Circuit approach (Brief for this *amicus,* 8-10). This fact strongly suggests that federal courts are seeking to limit developers' forum shopping in their intent to constitutionalize their land-use grievances. *See, e.g., Coninston Corp.* v. *Village of Hoffman Estates,* 844 F.2d 461 (7th Cir. 1988); *Harding* v. *County of Door,* 870 F.2d 430 (7th Cir.) *cert. denied,* 493 U.S. 853 (1989); *G.M. Engineers & Associates, Inc.* v. *West Bloomfield Township,* 922 F.2d 328 (6th Cir. 1990); *Lemke* v. *Cass County,* 846 F.2d 469 (8th Cir. 1987); *Yale Auto Parts, Inc.* v. *Johnson,* 758 F.2d 54 (2d Cir. 1985); *But see, Sinaloa Lake Owners Ass'n* v. *City of Simi Valley,* 882 F.2d 1398 (9th Cir. 1989) *cert. denied* 110 S.Ct. 1317 (1990) (holding that existence of state remedies irrelevant if claim of substantive due process stated) and *Littlefield* v. *City of Afton,* 785 F.2d 596 (8th Cir. 1986) (holding existence of state remedies does not affect substantive due process claim of arbitrary conditions placed on granting a building permit).

Respondents do not dispute that the Due Process Clause, like its forebear in Magna Carta, was intended to secure the individual from the arbitrary exercise of governmental power. Neither could they dispute the centrality of the right to property in constitutional thought during the revolutionary era. "Liberty and Property" was the motto of the revolutionary movement. Arthur Lee had declared in 1775 that the right of property "is the guardian of every other right".[24] But the phrase "by the law of the land" in Magna Carta historically was defined largely in procedural terms, requiring simply that customary legal procedures be followed before a person could be punished for criminal offenses. The purpose of due process, then, was to protect individuals against arbitrary punishments.

This Court over a century ago rejected the view that the Due Process Clause can be used to review in this Court "the abstract opinions of every unsuccessful litigant . . . of the justice of the decision against him. . . ." *Davidson* v.

[24] Arthur Lee, *An Appeal To The Justice and Interests of the People of Great Britain, In the Present Dispute with America*, 4th ed. (New York, 1775), p. 14, quoted in J.W. Ely, Jr. THE GUARDIAN OF EVERY OTHER RIGHT (Oxford University Press) (1992) (Bicentennial Essays On The Bill of Rights) p. 26.

New Orleans, 92 U.S. 97, 104 (1878). Petitioner obtained review of Rodriguez's decision both in the Superior Court and in the Supreme Court of Puerto Rico. Neither of these found any merit in petitioner's claim that Rodriguez had illegally departed from established procedures and practice at ARPE when he dismissed petitioner's project.

Petitioner is not now asserting a "taking" claim; that claim was abandoned at the time petitioner filed its Amended Complaint. The Amended Complaint which the Court reviews today purports to trace a history of undue delays in connection with petitioner's construction drawings and the processing of its project. Paragraph No. 37 of the Amended Complaint avers that the history of "undue delays" dates back to February 1983. The first complaint, however, was filed in December 1987; and respondent Rodriguez, who petitioner seeks to hold personally liable for this history of "undue delays", had assumed his official duties at ARPE only nine months before the filing of this complaint.

That petitioner pleaded a "taking" of its property "without just compensation" in its first complaint, and afterwards abandoned this claim, raises a legitimate concern that disgruntled developers will resort to the Due Process Clause to litigate, under the guise of official misconduct, what are, in reality, unripe "taking" claims.

Petitioner's *amicus* The Institute For Justice purports to disclaim any duplicative effect of this theory of litigation, but notes that "[m]any of the lawsuits challenging arbitrary denials of property development rights allege both 'takings' claims . . . as well as substantive due process claims under the Fourteenth Amendment" (Brief for this *Amicus* at 16). The Institute For Justice precisely

articulates respondents' concern. This *amicus* states that "substantive due process is more amenable to equitable relief, such as writs of mandamus, that are often necessary to vindicate the property rights . . . [because] taking claims are not ripe until state compensation proceedings are exhausted, whereas federal substantive due process claims are ripe the moment the constitutional injury occurs" (*Id.* at 17).

Respondents urge the Court to tread with caution and restraint and avoid an expansive reading of the Due Process Clause that would allow for immediate ripening of "taking" claims. Respondents have not placed any unconstitutional restrictions on petitioner's property and petitioner has yet to exhaust its administrative remedies before the Puerto Rico Planning Board. The dismissal of its project at ARPE in August 1988 did not deprive petitioner of any economically viable use of its property in Vacia Talega; it only required petitioner to administratively reopen its case at the Planning Board and petition the Board for a variance or an exemption, or otherwise allow the Board to review the project in light of new parameters for land-uses in Vacia Talega.

Petitioner bypassed the Planning Board's remedies in favor of a lawsuit in federal court that is touted by *amicus* The Institute For Justice for its sole virtue of allowing immediate "ripening" of "taking" claims, through the device of pleading "official misconduct." "[T]he history of substantive due process", indeed, "counsels caution and restraint" — *Moore* v. *City of East Cleveland*, *ante*, at 502 (quotation omitted).

Inasmuch as petitioner has failed to identify a substantive constitutional interest in connection with its claim to a permit process free of undue delays, and in connection

with its asserted right to "devote its land to any legitimate use", respondents believe that their denial of a construction permit to petitioner does not give rise to a substantive due process claim actionable under Sec. 1983.

CONCLUSION

The decision of the First Circuit Court of Appeals should be affirmed.

Very Respectfully Submitted,

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February 3, 1992

APPENDIX

COMMONWEALTH OF PUERTO RICO
REGULATIONS AND PERMITS ADMINISTRATION
Santurce, Puerto Rico

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Case No. 71-083-Urb.

[**NB:** All underlining in the translation is by hand in the original text.]

ALTERNATE PRELIMINARY DEVELOPMENT FOR THE FIRST SECTION HOTEL - RESIDENTIAL - TOURIST PROJECT IN THE BARRIO TORRECILLA BAJA OF LOIZA

The Puerto Rico Planning Board, through the First Extension to Report Number 72-Urb.-001-F, *of July 24, 1974*, approved an alternate preliminary development proposed by P.F.Z. Properties, Inc., for a tourist-residential project to be built on a parcel of land measuring *266.41 cuerdas*, part of a tract of land of larger capacity located at Barrio Torrecilla Baja of the Municipality of Loiza.

On *May 14, 1976*, through the Second Extension to the report cited, that Board dismissed a motion for reconsideration formulated on August 21, 1974, by Attorney Pedro J. Saade, representing residents of the sector opposed to the project in question. Through that resolution, the Board approved an alternate preliminary development for *the First Section* of the project, to be developed on a parcel with a capacity of approximately one

hundred and six *(106) cuerdas*, for a total of *two thousand (2,000)* (Two stars, written by hand) hotel *rooms* and *two thousand (2,000) housing units.*

The Second Section of the project will be developed on the remainder of the main property whose total capacity is 266.41 cuerdas, according to the alternate preliminary development plan approved for the First Section. This section will be developed for residential-tourist-hotel use, according to provisions and conditions stipulated in the Board's report mentioned above.

On June 22, 1976, through the Third Extension to Report Number 72-Urb.-001-F, the Planning Board dismissed a motion for reconsideration filed before it by the Office of Legal Services of Puerto Rico, Inc., representing residents opposing the aforementioned resolution.

Not agreeing with the decision taken by the Planning Board, the neighbors appealed to the Superior Court, San Juan Section, which dismissed that petition. Subsequently, in a ruling of January 4, 1978, the Honorable Supreme Court of Puerto Rico DENIED a petition for Certiorari presented before that Court. From this date [Arrow hand-drawn from the above-mentioned 1978 to "From."], the one-year validity period for the project begins.

On August 24, 1978, the proponent, through the firm Basora & Rodriguez, submitted to the consideration of this Regulations and Permits Administration an alternate preliminary development, Case Number *78-21-A-698-CPD*, for the first section of the project referred to. That itself consists of the development of a plot with an approximate capacity of *79.93 cuerdas*, divided into five areas called parcels *1, 2, 3, and 4* for hotels and residential units, as well as for related uses such as vicinal facilities and vicinal services; *parcel A* to be developed and ceded as a public facility by the developer.

The limits of the 79-93 – *cuerda* parcel proposed, correspond with those of the plot of 106 *cuerdas* described in the alternate preliminary development approved by the Board for the First Section of the project on May 14, 1976.

The alternate preliminary development submitted was examined in accord with the guidelines outlined for the development
[urbanizacion] of lands in Puerto Rico, in the light of the provisions of the planning regulations and norms in force, of the studies being done leading to the formulation of the Integral Development Plan for Puerto Rico, and taking into consideration the conditions stipulated in resolutions adopted by the

Planning Board, all of whose parts the proponent must comply with, and, furthermore, specially with those spelled out as follows:

(1) Because the area in which the development of this project is proposed, included within the Barrio Torrecilla Baja of the Municipality of Loiza, lacks the necessary infrastructure to serve it, all the works of public facilities and services such as access, water, electricity, sanitary sewer system, etc., will be provided by the proponent, following the recommendations and requirements of the government agencies concerned. *The movement of earth, disposal of storm water and effluents of the sanitary sewer system, will be done and disposed of, so as not to have a significant adverse effect on the ecology of the surrounding area, in the* preparation of the final construction plans required

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CASE NO. 71-083-URB.

for any of the works to serve this project, attention will be paid to compliance with the conditions and requirements established by the Planning Board, the Regulations and Permits Administration, and the other government agencies concerned.

(2) Immediate access to be provided to the project will be provisional, using the existing road, and maintaining as much as possible the current alignment, easement, and grade, and in conformity to what is indicated in the alternate preliminary development plan which this document approves.

(3) *The vehicular traffic capacity of that access will be that which the Department of Transportation and Public Works may fix.* That capacity will be *used to determine the number of housing and hotel units for which this Administration will issue a construction permit.* Upon reaching the traffic volume fixed by that agency, without the totality of the units permitted by the Board having been approved, additional construction permits will only be authorized in proportion to the traffic capacity added through improvements to the provisional access, or with the construction of any other alternate access route.

(4) The road to be designed and built with the capacity required to satisfy the traffic volume to be generated by the totality of the housing and hotel units authorized by means of this report, as stipulated in Clause Number 3, will take into consideration the preponderant character of open spaces, conservation or recreation

areas of the sector to serve in its extension, the need to protect the *adjoining mangroves*, and [the need] to avoid the works constituting an *obstruction* to the *free flow of the waters coming from floods of the Rio Grande de Loiza*. [All of # 4 marked by hand in margin, illegible letters, then letters "J.C.A."]

(5) It will be the responsibility of the developer to provide on his own account the *maintenance* and *upkeep* of the access road, while construction for the urbanization project lasts. To that end, the developer shall post a bond for the maintenance and upkeep of the access road, as determined by the Department of Transportation and Public Works, and/or the Municipality of Loiza. *That strip of land adjoining the ocean litoral coastline [litoral maritimo terrestre] illustrated in the alternate preliminary*

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*develpment approved by means of this resolution, will be maintained as an open space. This strip of land will be maintained free of structure, excepting those commonly related to developments of public park and beach resort areas, such as for example: b*enches, arbors [*glorietas*] [can also mean a little garden patiol, showers, dressing rooms, and pedestrian walkways. In preparing the corresponding registration plans, that strip will be labelled as open space. Those stretches of this strip of lands set to be devoted and ceded, by deed, for public use, will be accounted as part of the lands for vicinal facilities required by Planning Regulation Number 9 (Regulation on Vicinal Facilities), and in addition to the aforementioned labelling, they shall read "For Public Use" [*"Dedicados a Uso Publico"*]. The developer will retain the title to those open spaces that are not accounted part of the vicinal facilities.

(7) In addition to those strips of lands to be devoted and ceded for public use, vicinal facilities will be provided with their corresponding lands, in the blocks designated for residential use. This area to be devoted and ceded for public use, will be proportional to the number of housing units to be built in each block. The total capacity of these areas will be limited to receiving a credit that will not exceed four (4) *cuerdas*, as part of the lands to be computed among those required for the vicinal facilities of the project. In no way does this prevent the developer

or project developer from including on his own, should he so desire it, a greater area for those purposes in each block of predominant residential use.

(8) The facilities for active recreation required by Planning Regulation Number 9 may be substituted by facilities related to the development of beach resorts, such as showers, dressing rooms, sanitary services, parking areas. These shall be located on the lands to be ceded for public use that are facing the *beach* areas *in the cove that is located to the west of Punta de Vacia Talega, and shall have the effect of making viable the enjoyment of the recreational use by the citizenry in general on those beaches.*

(9) *Spaces or locales will be provided for commercial use*, local in character, in accord with Planning Regulation Number 9, forming

part of the main buildings, or annexed to those primarily devoted to hotel use.

(10) Together with the construction plans for the urbanization works, the developer shall submit to this Regulations and Permits Administration, for its information, *a program and time-table for the construction of the urbanization work, and for the housing units and hotel rooms of this first section, as well as, information on agreements that have been made to provide the required infrastructure and basic services.* [Number 10 circled, paragraph marked in margin.]

(11) The developer will submit, furthermore, to the consideration of this Administration, a program or time-table for the development and construction of the project's vicinal facilities, so that in occupying the first building for residential use, its dwellers will be able to have the minimum required facilities.

(12) [Number circled] Because this a project proposed to develop as a hotel-tourist-residential complex, only segregations *[segregaciones]* corresponding to the requirements of Planning Regulation Number 9

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(Vicinal Facilities), and those essential to facilitate their financing will be authorized. Both sorts [of segregations] will accord in their delimitations, development, and use, with what is set forth in the internal preliminary design that the Regulations and Permits Administration may approve, with the endorsement of the *Tourism Development Corporation*, for the different blocks included in the first section of the alternate development approved by this resolution.

(13) Building design and construction

(a) Total housing and hotel units

Buildings will be designed and built to include the number of housing and hotel units that are authorized by this resolution, as well as those others that might be reconverted from hotel to housing, as may subsequently be determined.

(b) Reconversion of hotel rooms to housing units

The proposed conversion of one thousand five hundred (1,500) hotel rooms to residential apartment units under the principle of condo-hotel is allowed. These will be distributed proportionately among the blocks, the five hundred (500) remaining rooms will be located among the blocks to be developed for predominant hotel use. Each hotel room will be

equivalent to 0.4 basic housing unit. The totality of the condo-hotel units will be exclusively for hotel use, because the development concept is hotel-tourist.

(c) Height of buildings in the environs of the Coastal Zone

The height of buildings to be built in the plots located in the environs of the Coastal Zone, will be limited to that which produces a minimum shade effect on the beach area, and, furthermore, will conform to the applicable regulatory provisions.

(d) In the design of the residential buildings, one will take into consideration the location and development of the vicinal facilities that must be provided on the same plot.

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(e) Construction area, occupied area, patios, parking, and other regulatory provisions.

For all those regulatory provisions that govern the construction of buildings, not individually specified in this resolution, those established by the Regulation on Zoning for R-5 Residential Districts and for hotels, and by any other applicable regulation in effect, will be followed.

(f) Certification of Plans

Before certification of the structures, approval of the construction plans for the urbanization works to serve the project shall have been obtained, which *[las cuales*, referent unclear] shall be submitted to the consideration of the corresponding Regional Office.

On all plan certifications it must be clearly verified that there has been compliance with all the requirements stipulated for the project by the Planning Board, this Regulations and Permits Administration, *and any other public agency concerned.*

(14) Other Conditions [Number circled and starred.]

(a) *Before authorization of any work of* urbanization or construction of a building, there shall be presented *a plan endorsed by the Environmental Quality Board for provision of services of collection and disposal of solid wastes originating in the project.*

(b) *There will be no spraying of insecticides or chemical compounds designed to kill insects that might effect the natural life of the mangrove zone outside the area of the project under consideration, or that might extend and affect those zones.*

(c) Ramps shall be provided on the sidewalks that facilitate movement of the handicapped in wheelchairs, [with] canes, or other medical equipment, at the crosswalks of streets, or pedestrian walkways, according to Resolution JP-221 adopted by the Puerto Rico Planning Board on March 24, 1976. These ramps shall be built on the corners formed by street intersections, or in strategically selected places, and shall have a grade not greater than five per cent (5%), with a width equivalent to the sidewalks on which they are built. The detail

of those ramps shall be included in the construction plans required for this project.

There follows a breakdown of the preliminary alternate development presented to the Technical Review Office of the Regulations and Permits Administration for this project, which includes around 500 hotel rooms, and 3,056 housing units (1876.6 basic units), distributed in 1,952 residential apartments (1366.2 basic units), and 1,104 condo-hotel apartments (510.4 basic units).

USE	*CUERDAS* (APROX.)	PER CENT
Residential	16.03	20.06
Hotel, Condo-Hotel	11.35	14.20
Streets and accesses	11.69	14.63
Vicinal facilities in residential centers	3.17	3.97
Open spaces	17.46	21.84
Areas to be developed and ceded for public use	10.49	13.12
Archaeological reserve to be ceded for public use	5.20	6.51
Vicinal services		

and accessory uses	4.54	5.67
TOTAL	79.93	100.00

By means of this document, taking into consideration the foregoing, and by virtue of the provisions of Administrative Orders ARP No. 8 of October 24, 1975, and APR No. 77-13 of December 1, 1977, and in harmony with what is established in Law Number 76 of June 24, 1975 of the Regulations and Permits Administration, the Assistant Administrator of the Technical Review Office of this Administration APPROVES the alternate preliminary development for Case No. 78-21-A-698-CPD, related to a hotel-tourist-residential

project (Vacia Talega), that is located in the Barrio Torrecilla Baja of Loiza, and AUTHORIZES preparation of the construction plans in the fashion required in this report, and in accord with the preliminary development plan approved.

This resolution *[acuerdo]* will be in effect for the period of one (1) year, from the date of notification of this report. UNDERSTANDING, that if the construction plans are not submitted within the period indicated, the case will be considered abandoned, and it will be SENT TO THE FILES for all legal effects.

ORDERED THAT: (1) the vicinal facilities shall be provided in accord with the provisions of Planning Regulation Number 9, and as this report indicates; (2) the preliminary development of those facilities shall be submitted within the effective time period granted for this project; (3) the other indications, recommendations, and requirements and/or provisions indicated in previous resolutions not altered by this report, maintain all their force and effect; (4) the proponent shall notify this Administration of any transaction in which the lands may be involved, to make the corresponding annotations or changes in the case file, within a period of three (3) months, from the date on which that transaction is made; (5) the foregoing requirements that are considered necessary by this Administration to make this project viable, are subject to review [can also mean: revision] from time to time, as the conditions vary; (6) any party affected may request a reconsideration of the action

taken, as expressed in this document, by the Assistant Administrator of the Technical Review Office of this Administration, within the thirty (30) days following the date of notification of this report, and (7) the construction plans for the urbanization works shall be submitted to the consideration of the Regional Office of the Regulations and Permits Administration at Carolina."

I CERTIFY· That the foregoing is a faithful and exact copy of the resolution *[acuerdo]* adopted by the Assistant Administrator of the Technical Review Office of the Regulations and Permits Administration, at its meeting on February 20, 1981.

For general knowledge I issue this present copy, and I notify all interested parties at the addresses registered in our files.

In San Juan, Puerto Rico, today (Stamped] Feb. 24, 1981.

[Signature]

MARIANO RODRIGUEZ
DELGADO
Authorized Employee

[Stamped box]
SAVE THESE DOCUMENTS PERMANENTLY: THEY ARE VERY IMPORTANT FOR FUTURE ACTIONS ON YOUR PROPERTY OR BUSINESS.

App. and/or Case Number: [By hand] 71-083 Orb.